

**In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division**

**FILED**

at 10 O'clock & 20 min A M  
Date 5/22/03

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MB*

In the matter of:

JOSEPH W. PISCHKE, III

*Debtor*

)  
) Chapter 7 Case

)  
) Number 99-43206

ROBERT M. OSBORNE

*Debtor*

)  
) Chapter 7 Case

)  
) Number 99-43209

**ORDERS ON TRUSTEE'S FEES**

The final hearing in these Chapter 7 bankruptcy cases, both of which were filed in November 1999, took place on February 20, 2003, for the purpose of determining the distribution of funds in each case. All matters were resolved at that time except the amount of compensation that should be paid to James B. Wessinger, III, who has served as the Trustee and as attorney for the Trustee in both cases. Mr. Wessinger seeks trustee compensation at the statutory maximums of \$8,164.04 in the Osborne case and \$8,192.18 in the Pischke case, attorney's fees for services rendered to the estates in the amounts of \$1,037.50 in Osborne and \$1,175.00 in Pischke, and trustee expenses in the amounts of \$43.65 in Osborne and \$41.04 in Pischke.

Kathleen Horne, counsel to the Debtor, objected to allowance of the trustee fees on three grounds: (1) the maximum statutory trustee compensation is excessive, given the amount of actual time devoted by the Trustee to administer the cases; (2) the cases have not been diligently administered and closed by the Trustee; and (3) the only asset ultimately recovered in each estate was a check in the amount of approximately \$92,000.00, which the Debtor's counsel obtained as a result of pre-petition litigation and forwarded to the Trustee for administration.

Inasmuch as Mr. Wessinger's original applications did not include documentation of trustee services, the Court left the case records open after the February 20 hearing to allow Mr. Wessinger to supplement his fee applications by showing all of the services rendered and the amount of time devoted to each task undertaken in his capacities as the Trustee and as attorney for the Trustee in each case. Mr. Wessinger provided that documentation.

This Court has jurisdiction in this matter, a core proceeding under 28 U.S.C. § 157 (b) (1) & (2) (A), pursuant to § 1334 (a) & (e) and the standing order of reference of the District Court for the Southern District of Georgia.

## DISCUSSION

The Bankruptcy Code provides for awarding “reasonable compensation for actual, necessary services” and “reimbursement for actual, necessary expenses” to a trustee and to counsel employed by a trustee “to represent or assist the trustee in carrying out the trustee’s duties.” 11 U.S.C. §§ 330 (a) (1) & 327 (a); *see also* id. § 327 (d) (providing that court may authorize trustee to act as attorney for estate). The award may be less than the requested amount. Id. § 330 (a) (2). In determining the appropriate amount of compensation, “the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors.” Id. § 330 (a) (3). Those relevant factors include:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Id. § 330 (a) (3) (A)–(E).

Having carefully reviewed Mr. Wessinger's accounting of the services rendered as attorney to the Trustee and the description of the services in each case, *see, in each case*, Mot. for Final Compensation of Att'y for the Trustee (filed Sept. 6, 2002), I find all of them to have been reasonable and necessary. I have also reviewed Mr. Wessinger's supplemental submissions containing itemizations of trustee time and unbilled attorney time devoted to the cases, which totals 21.2 hours in the Osborne case and 24.2 hours in the Pischke case, *see, in each case*, Trustee's Suppl. Resp. (filed Mar. 6, 2003), and find that those hours were actually expended, necessary, and reasonable.

The starting point in determining an appropriate award of professional compensation is to determine the lodestar rate by multiplying the hours reasonably expended on a case by the prevailing hourly market rate for similar services. Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988); In re Concrete Prods., Inc., 208 B.R. 1015, 1022 (Bankr. S.D. Ga. 1996) (Davis, C.J.). The amount may then be adjusted up or down from the lodestar, in the discretion of the bankruptcy court, based on the results obtained and on considerations such as excessiveness or inadequacy of fee applications. Id. at 1023.

Mr. Wessinger requests attorney fees at an hourly rate of \$125.00, which rate is also reasonable in this District as trustee compensation. Based upon the 29.5 hours

actually expended by Mr. Wessinger in the Osborne case in his capacities as trustee (21.2 hours) and as attorney to the Trustee (8.3 hours), the total lodestar fee to which Mr. Wessinger is entitled in the Osborne case is \$ 3,687.50. Based upon the 33.6 hours actually expended by Mr. Wessinger in the Pischke case in his capacities as trustee (24.2 hours) and as attorney to the Trustee (9.4 hours), the total lodestar fee to which Mr. Wessinger is entitled in the Pischke case is \$4,200.00.

Compensation for a Chapter 7 trustee is subject to a statutory cap<sup>1</sup>:

[T]he court may allow reasonable compensation . . . for the trustee's services . . . not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000 . . . upon all moneys disbursed or turned over in the case by the trustee to parties in interest . . . .

Id. § 326 (a).

When cases are efficiently and timely administered, trustees are often – but not always – entitled to the maximum percentage recovery. Such determination must always be measured against the ultimate benefit to the estate and to the debtors, the time a case takes

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<sup>1</sup> When the same individual serves as attorney to the trustee and as trustee, the statutory percentage cap applies only to the trustee services, and attorney compensation is separate and additional. In re Concrete Prods., Inc., 1992 WL 12001764, \*9 (Bankr. S.D. Ga. 1992) (Davis, J.).

to be administered, and the actual number of hours expended by the trustee in case administration. See In re Concrete Prods., 1992 WL 12001764, \* 30-33 (Bankr. S.D. Ga. 1996) (Davis, C.J.).

In each of the present cases, the Trustee's compensation is capped at a percentage which would yield a fee of slightly less than \$8,200.00. This is a maximum amount, not an entitlement: the Court retains the duty to award lower fees if appropriate. See In re Drew, 272 B.R. 8, 12 (Bankr. D. Wy. 2001) (noting majority view that maximum fee is subject to reasonable compensation determination under § 330).

The Trustee's position is that a Chapter 7 trustee's fee award should not be limited to the lodestar amount. He argues that because of the administrative burdens placed upon a trustee in multiple-case administration, the accounting compliance and reporting requirements of the United States Trustee on panel trustees, and the fact that trustees handle many cases that are either no asset or of limited value and essentially operate at a loss, the allowance of percentage fee in the maximum amount is justified in those cases where the recovery is more favorable to the estate. See, *in each case*, Trustee's Suppl. Resp. Debtor asserts that these are impermissible considerations for determining the appropriate amount of a trustee's fees.

This Court agrees with Debtor. Trustees are not entitled to recoup their overhead expenses or to extract from one bankruptcy estate compensation for efforts made on behalf of other estates. "Overhead expenses are those incurred day to day by a law office regardless of whom it represents," as contrasted with costs and expenses attributable to a particular entity. In re S.T.N. Enters., Inc., 70 B.R. 823, 844 (Bankr. D. Vt. 1987). The most common of those expenses include rent, insurance, taxes, utilities, secretarial and clerical pay, *see id.*, but in certain office environments, other expenses may be considered to be in the nature of "overhead." In a trustee's office, expenses incurred because of the trustee status and certain risks inherently attached to such position are also in the nature of "overhead expenses" *as to a particular debtor* where such expenses are incurred without regard to *that particular debtor's case*. Here, because "[b]ankruptcy courts are not at liberty to engage in vicarious generosity," *id.* at 838, only the expenses incurred directly because of each of *these* debtors' cases are compensable out of each of their respective bankruptcy estates.

Enhancements of the lodestar fee have been allowed by courts whose opinions have fully articulated the rare and exceptional bases of the awards, and where either unique or unforeseen obstacles had emerged, results had far exceeded expectations, or the party paying the fee had consented. In re First Am. Health Care of Ga., Inc. (Order on App. for Enhancement of Compensation), Chapter 11 Case Nos. 96-20188-96-20218, slip op. at 17-20. In each of the present cases, there is no basis for enhancement. Debtor's counsel

correctly points out that the only asset ultimately recovered in each case was one over which the Trustee and his counsel were required to expend very little effort. In addition, upon review of the file and reflection upon this Court's observation of the handling of each case over its term, I find that neither case was handled in a timely and expeditious manner; thus, to the extent the Trustee may otherwise have been entitled to an enhanced award, it is not appropriate in either of these cases.

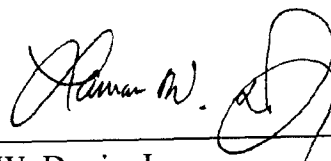
Mr. Wessinger, as the Trustee and the Trustee's counsel, performed reasonable and necessary duties in the administration of the cases. I conclude that the appropriate awards in each case are the lodestar amounts -- \$3,687.50 in the Osborne case and \$4,200.00 in the Pischke case, plus expenses advanced in each. The services were statutorily required and Mr. Wessinger is entitled to reasonable compensation for that work. This conclusion is limited to a determination that, under the facts and circumstances of these cases, enhanced fee awards permitting additional fees approaching the statutory minimum are not appropriate.

IT IS THEREFORE ORDERED:

- (1) From the Osborne estate, the Trustee and the Trustee's counsel shall be awarded \$3,687.50 in fees and \$43.65 in expenses advanced;
- (2) From the Pischke estate, the Trustee and the Trustee's counsel shall be awarded



\$4,200.00 in fees and \$41.04 in expenses advanced.



Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21<sup>st</sup> day of May, 2003.

**CERTIFICATE OF MAILING**

I hereby certify that a copy of this document  
was mailed to the parties indicated hereon:

By S. Baymore 5/22/03 5  
Deputy Clerk Date No.

DS - Osborne, Pischke

DA - Horne

Ch. Trustee - Wessinger

US Trustee - Berry